Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1590

WILLIAM C. KAHL,
State Superintendent of Public Instruction,
Petitioner,

v.

HOLY TRINITY COMMUNITY SCHOOL., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

Respondent disagrees with Petitioner's contention

> "that the validity of a state statute is drawn into question as violating the prohibition against the establishment of religion as provided by the first amendment to the United States Constitution."

The Wisconsin Supreme Court found an administrative misinterpretation of a Wisconsin statute which misinterpretation was found to violate the prohibition against the establishment of religion as provided by the First Amendment to the United States Constitution.

QUESTION PRESENTED

1. Where a State official is responsible for administering a state statute providing transportation for children to private schools, whether religious or non-religious, which statute provides that the attendance areas from which transportation will be provided to private schools affiliated with the same religious denomination shall not overlap, may such state official, in the absence of fraud, inquire beyond the Articles of Incorporation and By-Laws of a religious private school which prohibit "affiliation" with any religious denomination, to make his own determination that such school is or is not "affiliated" with a particular religious denomination?

STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioner's statement.

STATEMENT OF THE CASE

The Respondent agrees with the Petitioner's Statement of the Case, except the sentence:

> "The respondent school attempted to disaffiliate with the Roman Catholic Church by filing Articles of Incorporation to that effect with the Wisconsin Secretary of State."

The respondent school was incorporated as a Wisconsin non-stock, non-profit corporation. The By-Laws provide that the school maintained by the corporation shall be operated in a Christian-Judeo tradition, that students are to be encouraged "to practice the religion of their choice", that there shall not be any "affiliation" with

any religious denomination. The Respondent has never operated a school affiliated with any religious denomination.

HOW FEDERAL QUESTION IS PRESENTED

Respondent agrees with Petitioner's statement.

REASONS FOR NOT GRANTING WRIT

A. The Actual Question Presented Is Very Narrow.

The question actually presented by the Wisconsin Supreme Court opinion is a very narrow one. It is limited to a particular Wisconsin administrative misinterpretation of a Wisconsin statute, and to a particular set of facts arising under that statute. The questions posed by the Petitioner are not present in the case. They are anticipatory of issues which the Petitioner thinks may arise in other situations under other statutes. Further, although the court chose to base its opinion on the First Amendment, it could base the same opinion on Article I, Section 18 of the Wisconsin Constitution which substantially parallels the First Amendment in interpretation, except that it goes further than the First Amendment in prohibiting state interference in religious affairs. *State ex rel. Warren v. Nusbaum,* 55 Wis. 2d 316, 198 N.W.2d 650 (1972); *State ex rel. Reynolds v. Nusbaum,* 17 Wis. 2d 148, 115 N.W.2d 650 (1962).

B. The Opinion Below Correctly Interprets The Establishment Clause.

The Wisconsin Supreme Court opinion did not hold, as Petitioner seems to infer, that the State may not in-

quire whether an organization is or is not religious. The Court held, that under the Wisconsin school transportation statutes

> ". . . the authority of the legislature to provide for the transportation of children to and from any parochial or private school is unchallenged. The nature of the school, whether it be public or private, sectarian or not, therefore is irrelevant to its statutory right to receive transportation aids." (*See* Petitioner's Appendix, p. 104)

The real contention of the Petitioner, as put by the Court is

> "The Superintendent of Public Instruction would have us ratify what he conceives to be his duty — the continuing surveillance of this school to determine whether its practices comport with those of the Catholic Church. He would have us say that he can properly make the determination of who or what is Catholic." (*See* Petitioner's Appendix, pp. 112-113)

and

> ". . . the Superintendent of Public Instruction would attempt to have us determine on the basis of his findings that Community School practices in reference to religion are *exclusively* referable to 'affiliation' with the Catholic denomination." (*See* Petitioner's Appendix, I a at 113, ***Emphasis added***)

There is no federal constitutional prohibition against providing school transportation to parochial schools. *Everson v. Board of Education,* 330 U.S. 1 (1947). Thus, the decision that Respondent is entitled to an attendance area for school transportation purposes does not create any constitutional issues. The constitutional problem created in this case was created by the Petitioner's administrative opinion that Section 121.51(3) permitted the Petitioner to make determinations of religious affiliation in order to decide whether Respondent should have a large or small attendance area.

The potential effect on administration of programs of tax exemption and educational assistance argued by Petitioner is non-existent. The holding of the case is very limited:

> "In respect to the case before us, we hold only, where a religious school demonstrates by a corporate charter and by-laws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there." (*See* Petitioner's Appendix, p. 121.)

C. The Opinion Below Does Not Put The Petitioner In The Position Of Violating The Establishment Clause.

Petitioner argues that under *Walz v. Tax Commission,* 397 U.S. 664 (1970) the finding of fact that an institution is or is not affiliated with a particular religious denomination does not establish or interfere with religion. It is a long step from *Walz* to where Petitioner wants to go.

A determination that a particular piece of exempt property was in fact being used for religious worship as in *Walz* is not the same as a determination that a religious practice relates exclusively to or shows affiliation with one particular denomination. The other cases cited by Petitioner do not relate to civil law determinations of affiliation or non-affiliation with particular ecclesiastical groups, but with civil law determinations of which ecclesiastical bodies have the authority to make the ecclesiastical determination of affiliation or to determine conflicting claims over reality or personalty between opposing or split religious groups.

In the case at hand, an administrator of the State of Wisconsin has made a determination of church membership. Respondent submits that a better rule was established long ago when this Court stated "we cannot decide who ought to be members of the church. . .". *Bouldin v. Alexander,* 15 Wall. 131 at 139, 140 (1872).

D. There Is No Jurisdiction Under 28 U.S.C. § 1257(3).

The jurisdictional claim of the petitioner is that the constitutionality of a state statute is at issue. That is not correct. The only matter at issue is an administrative interpretation of a state statute. The Wisconsin Supreme Court struck down that interpretation. The validity of the statute was never questioned by either party.

E. Conclusion

Based on the foregoing, Respondent respectfully submits that the decision of the Wisconsin Supreme Court is not in conflict with established law and the Writ of Certiorari should be denied.

Respectfully submitted,

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